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No. 93-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LONNIE K. STEPHENS,
Petitioner,

v.

CHARLES B. MILLER, WARDEN, and
ATTORNEY GENERAL OF THE STATE OF INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STATEMENT

Petitioner Lonnie K. Stephens was convicted of attempted rape. His request for habeas corpus relief centers around the state trial court's exclusion of Petitioner's testimony regarding his victim's sexual reputation and past sexual conduct with others.

1. On March 17, 1987, at around 10:00 p.m., Petitioner—uninvited and drunk—entered the trailer of Melissa Wilburn, an acquaintance of his. Pet. App. 90a-91a. According to Wilburn, Petitioner made three unwanted, and increasingly aggressive, sexual advances toward her, each of

which she rebuffed. *Id.* at 66a-67a. At Wilburn's repeated insistence, Petitioner finally agreed to leave, but requested first to use her bathroom. *Id.* at 67a. When he returned from the bathroom, Petitioner violently attacked Wilburn and attempted, unsuccessfully, to rape her. He grabbed her, threw her on the couch, covered her mouth with one hand and with his other, ripped her blouse, forced off her bra and touched her vaginal area. *Id.* at 67a-68a. When Petitioner reached down to remove his pants, Wilburn struggled free and ran screaming into the bedroom to awaken her sister and brother-in-law, with whom she lived. *Id.* at 68a. Petitioner fled on foot. *Id.* at 74a.

A few hours later, Wilburn's husband, from whom she was separated at the time, learned of the attack and, after an unsuccessful attempt to locate Petitioner, drove to Wilburn's trailer. There, he became involved in an altercation with Wilburn's brother-in-law over whether the brother-in-law could have prevented the attack. *Id.* at 69a. Wilburn's sister called the police, but before they arrived, the altercation had ended. *Id.* Neither Wilburn nor any of the other individuals present reported the attack to the police. *Id.* at 70a. The following day, Wilburn's landlord rebuked her for creating a disturbance and warned that future disturbances would not be tolerated. In response, Wilburn explained that she had been sexually assaulted by Petitioner. *Id.* at 70a-71a; *see also id.* at 18a.

Petitioner's defense at trial was that he and Wilburn had engaged in consensual intercourse. According to Petitioner's testimony, he arrived at Wilburn's trailer at 10:00 p.m., the two exchanged small talk for a brief moment, and then she eagerly assented to his sexual proposals, recommending to him that they move the furniture so they could perform these acts on the floor. *Id.* at 72a. Petitioner described to the jury in graphic detail their foreplay, the manner in which they disrobed one another and the sex act itself, including the rear-entry position they supposedly used for intercourse. *Id.* at 72a-73a. Petitioner further testified that during intercourse, he made a statement to Wilburn that angered her, causing her to interrupt the act,

order him to leave and run to awaken her sister. *Id.* at 73a. Under his version, Petitioner then got dressed, left the trailer and, after being lost for some period, stopped by an acquaintance's home, arriving at around 10:15 p.m. *Id.* at 74a.

Petitioner proposed to testify that while they were having intercourse, he told Wilburn that Tom and Drema Hall had informed him that Wilburn had participated in partner switching with them and that she had a reputation for enjoying intercourse "doggy fashion." *Id.* at 73a. Petitioner offered this testimony for the limited purpose of "show[ing] why Wilburn went to awaken her sister." Pet. Reply Br. to Ind. S. Ct. at 4. Petitioner did not argue to the trial court (or later to the jury) that his statement was central to his defense because it motivated Wilburn to fabricate the charge of attempted rape. Rather, Petitioner's explanation for Wilburn's charges was that she was attempting to mollify her landlord in order to avoid eviction. The trial court ruled that Petitioner's augmentation of his basic testimony, which comprised statements regarding Wilburn's sexual history with others, was inadmissible under Indiana's Rape Shield law, Ind. Code § 35-37-4-4. Petitioner made no attempt to offer modified, less graphic versions of his proffered statement in order to lessen the impact of the court's ruling. Pet. App. 16a.

Evidence at trial showed that Petitioner gave several conflicting accounts of the incident, denying in most accounts that he even entered Wilburn's trailer, much less had consensual intercourse with her. Evidence also demonstrated that he persuaded a friend to give knowingly false testimony regarding Petitioner's whereabouts on the evening of the attack. *Id.* at 75a-77a, 88a-89a. As the district court found,

> by the time [Petitioner] took the witness stand he had lied about what happened that evening to seven different people. He gave four different versions of the incident to his live-in girlfriend. He convinced his best friend, David Stone, to perjure himself. He

> gave a false report to Officer Allen Bell who was investigating the incident. It never appeared that the petitioner's credibility was ever a question for the jury.

Id. at 88a-89a. Petitioner was found guilty of attempted rape.

2. In a direct appeal to the Indiana Supreme Court, Petitioner maintained, as he did in the trial court, that Wilburn manufactured the charges against him in order to "cover herself with her landlady who was upset with the police being called to the trailer." Pet. Reply Br. to Ind. S. Ct. at 5. Petitioner did not argue that his purported statement to Wilburn regarding her sexual history and reputation caused her to retaliate by fabricating the rape allegations. To the contrary, Petitioner expressly disavowed any such argument: "Nowhere does [Petitioner] assert that Wilburn contacted the police because of what he said to her. The defense position is clearly that [Petitioner's] statement to her is important because it shows why Wilburn went to awaken her sister." *Id.* at 4.

Petitioner contended that the trial court's exclusion of his statement violated Due Process on the theory that the constitution demands that a criminal defendant be permitted to testify regarding, as he put it, the *"res gestae"* of the offense—that is, everything that occurred during the evening in question. Under Petitioner's theory, a "defendant should be allowed to testify as to what actually occurred during the time period in which it is alleged that he committed a criminal offense," Pet. Br. to Ind. S. Ct. at 14, and he emphasized that the statement was not offered for the truth of the assertion, *id.* at 15. Affirming his conviction, the Indiana Supreme Court found that the trial court's ruling was not a "mechanistic application" of Indiana's Rape Shield law and it did not "depriv[e] [Petitioner] from presenting relevant and probative evidence." Pet. App. 98a.

3. Petitioner sought federal habeas corpus relief, again claiming that he was unconstitutionally prevented from presenting the *"res gestae"* of the offense. Consistent with his position in the state courts, he emphasized that it "was not the petitioner's theory" that "the statements that [Petitioner] made to the alleged victim caused her to become so angry that she pursued the attempted rape charges against him." Pet. Response to Resp. Memo. in Support of Return to Show Cause at 2. The district court denied habeas relief, reasoning that

> The state's interest of protecting the victim was carefully balanced with the petitioner's constitutional right to testify throughout the entire proceedings. The trial judge tried to carefully and moderately apply the rape shield statute by allowing the petitioner to testify to all events that he alleged occurred that evening. Petitioner was permitted to give a detailed account of his version of the facts and the only testimony that the jury was not allowed to hear was the specific statement revealing an alleged aspect of the prosecutrix's past sexual practices. Except for the statement he was alleged to have made, the whole thrust of petitioner's version of the facts was before the jury.

Pet. App. 84a-85a. The district court also found that any constitutional error that may have occurred would have been harmless. "[N]o reasonable jury would have found the proffered testimony would have raised a doubt as to the petitioner's guilt." *Id.* at 89a.

4. A panel of the Seventh Circuit reversed. Essentially adopting Petitioner's *res gestae* theory, the panel reasoned that Petitioner's "Sixth Amendment right to testify on his own behalf guarantees him the right to tell the jury a full account of his version of the incident, including the specific

contents of the conversation." *Id.* at 60. Under its analysis, the panel found it constitutionally significant that Petitioner "did not propose to offer the testimony as evidence of Wilburn's past sexual conduct; rather, he sought to introduce the conversation as an explanation of the incident," and also suggested that "the conversation's contents are intimately related to the events that took place." *Id.* at 59. The panel further held that the error was not harmless, reasoning that Petitioner's version of the incident was "not necessarily impossible." *Id.* at 60a.

The full Seventh Circuit vacated the panel's decision, granted rehearing en banc and, by a 6-5 vote, affirmed the denial of habeas relief. No member of the Seventh Circuit, however, adopted or endorsed the panel's method of analysis. Applying a balancing test, the majority and concurring opinions concluded that the state court's exclusion of the statement regarding the victim's sexual reputation and history was neither arbitrary nor disproportionate to the legitimate purposes served by Indiana's Rape Shield law and that the statement was not critical to Petitioner's defense. *Id.* at 6a-7a, 15a-16a, 22a. The dissenting opinions applied the same balancing test, but resting on the assumption that Petitioner offered the statement in an attempt to show that it caused the victim to fabricate her charge of attempted rape, concluded that the statement was critical to Petitioner's defense. *Id.* at 25a-26a, 30a, 40a, 48a.

REASONS FOR DENYING THE WRIT

This case does not warrant further review for two reasons. First, it presents no legal issue over which there is any conflict or confusion among the lower courts, federal or state. Rather, this case raises a highly fact-bound application of the Court's well-established legal principles and the peculiar facts of this case are extremely unlikely to recur. Indeed, notwithstanding that the Seventh Circuit's en

banc review produced seven opinions, there was no disagreement of any substance within the court on the controlling legal principles. The court of appeals was divided merely as to (i) what the facts in this case actually are and (ii) how those odd facts apply to this Court's teachings.

Second, the Seventh Circuit's application of this Court's decisions was proper, so there is no need to correct its particular ruling. The proffered testimony was not critical or vital to Petitioner's defense, nor was it excluded arbitrarily. Petitioner's theory—that the constitution provides criminal defendants an unfettered right to testify as to anything that occurred at the time and place of the alleged offense—is inconsistent with this Court's jurisprudence and finds no support in any lower court decision.

1. This Court has long since determined that a defendant's right to testify and present evidence in his own defense "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). *See also, e.g., Michigan v. Lucas*, 111 S. Ct. 1743, 1746 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). A trial court possesses "wide latitude" to exclude relevant testimony "based on concerns about, among other things, harassment, prejudice, confusion of the issues, [and] the witness' safety." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Accordingly, this Court has established a case-by-case balancing test, in which the state's interest in the procedural rule relied on to exclude evidence is weighed against the defendant's interest in presenting it. If the state's interest in its procedural rule is legitimate and it has not applied its rule arbitrarily or mechanistically, then this Court has demanded that the evidence be "vital" or "critical" to the defendant's case in order for it to be admissible. *See, e.g., Lucas*, 111

S. Ct. at 1747; *Rock*, 483 U.S. at 55-56; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974); *Chambers*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. 14, 16 (1967). Moreover, this Court has held that the state's interest in excluding testimony of a rape victim's sexual history is entirely legitimate, explaining that "rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Lucas*, 111 S. Ct. at 1746.

In light of this Court's clear teachings, it is hardly surprising that no confusion whatsoever exists among the lower courts concerning the proper legal standard for resolving constitutional challenges to the exclusion of testimony under rape shield statutes. Without exception, the lower courts have applied this Court's well-crafted and straightforward balancing test, a fact that Petitioner does not dispute.[1]

Indeed, all seven opinions of the en banc Seventh Circuit in this case were in full agreement that Petitioner's claim was governed by this Court's balancing test. The disagreement within the Seventh Circuit had nothing to do with determining the correct legal standard for analyzing

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[1] *See, e.g., Sandoval v. Acevedo*, 996 F.2d 145, 148-49 (7th Cir.), *cert. denied*, 114 S. Ct. 307 (1993); *Logan v. Lockhart*, 994 F.2d 1324, 1330-31 (8th Cir.), *cert. denied*, 114 S. Ct. 722 (1993); *Wood v. Alaska*, 957 F.2d 1544, 1549-50 (9th Cir. 1992); *Jones v. Goodwin*, 982 F.2d 464, 469 (11th Cir. 1993); *United States v. Payne*, 944 F.2d 1458, 1469 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1598 (1992); *United States v. Torres*, 937 F.2d 1469, 1473-75 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 886 (1992); *Jeffries v. Nix*, 912 F.2d 982, 984-88 (8th Cir. 1990), *cert. denied*, 499 U.S. 927 (1991); *Lundy v. Campbell*, 888 F.2d 467 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990); *Johnston v. Pittman*, 731 F.2d 1231, 1235-36 (5th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985); *Doe v. United States*, 666 F.2d 43, 47 (4th Cir. 1981).

Petitioner's claim. The court of appeals differed merely on how to apply this case's highly unusual facts to that settled standard. Thus, the court was divided, first, as to the reason Petitioner offered the testimony of the victim's sexual history and reputation. Some concluded, correctly we believe, that Petitioner sought to introduce the statement to show why the victim allegedly withdrew her previously granted consent to intercourse and ran to awaken her sister. *See* Pet. App. 18a (Rovner, J., concurring); *see also* Pet. App. 27a n.1 (Cudahy, J., dissenting) ("the record does not make clear how prominent a role the excluded evidence would have played in Stephens' defense"). The others adopted the view that Petitioner intended to use the statement to show that the victim was so angered by it that she fabricated her charges of rape. On top of that purely factual disagreement, the court struggled with the issue of how critical or vital the precise words of his statement were to his defense, a dispute that is entirely fact-bound and has no application beyond this case. [2]

Not only is there complete uniformity in the law among the lower courts and the various opinions of the Seventh Circuit, there is also no confusion regarding the appropriateness of Petitioner's proposed standard. According to

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[2] For instance, Judge Flaum believed that Petitioner could have offered modified versions of the statement that conveyed its substance but were less denigrating to the victim, and that his failure even to attempt to do so reflected that Petitioner did not consider the exact language of the statement to be critical to his defense. Pet. App. 16a (Flaum, J., concurring). Judge Coffey concluded that only a portion of Petitioner's precise statement should have been admitted and the remainder was properly excluded. *Id.* at 40a (Coffey, J., dissenting). Chief Judge Bauer, writing for the court, concluded that the general version of the statement that Petitioner did present to the jury was constitutionally sufficient. *Id.* at 7a. And four dissenting judges believed that every word of Petitioner's excluded statement was critical to his defense. *Id.* at 24a (Cummings, J., dissenting); *id.* at 33a (Cudahy, J., dissenting); *id.* at 50a (Ripple, J., dissenting).

Petitioner, a defendant should have an unfettered right to testify as to any and all events that occurred at the time and place of the offense, irrespective of whether the testimony is critical or even relevant to his defense. Pet. at 22, 27-28. But that position has never been accepted by any court (other than the now-vacated panel decision here), as demonstrated by the fact that Petitioner has cited no authority to support it. Nor was that position adopted by a single member of the full Seventh Circuit.

Petitioner's only serious attempt to suggest a conflict among the lower courts does not even relate to the application of rape shield statutes, a fact that is hardly remarkable given the uniformity in the law on that issue. Rather, he claims that the courts are divided on whether testimony may be excluded based on the court's assessment of the credibility of the witness. Pet. at 17. But that issue is not raised by this case. The majority opinion does not contain even a hint, much less a holding, that it did not believe Petitioner and thus found the exclusion of his statement constitutional.

Petitioner's other efforts to identify conflicts all center on purported minor differences among the opinions of the Seventh Circuit here. *See* Pet. at 16, 18-20. Even if true, those differences have already been resolved by that court, making further review by this Court wholly unnecessary. In short, this case presents no issues of national importance over which there is any confusion below.

2. Review by this Court is also not warranted because the Seventh Circuit's decision was plainly correct. The record is uncontroverted that Petitioner's theory of defense was that Wilburn fabricated her charge of attempted rape in order to mollify her landlord, who had confronted Wilburn about the fact that the police had been called to her trailer. Pet. at 27 ("the trouble with her landlady was clearly the precipitating factor which caused her to make the initial

complaint"). *See also* Pet. App. 17a-22a (Rovner, J., concurring). Petitioner never argued below, nor does he argue here, that his alleged statement regarding the victim's sexual history and reputation provoked her to fabricate the charges against him.

Thus, far from being vital or critical, the excluded statement was entirely unrelated to his core defense. *See Chambers*, 410 U.S. at 302. Moreover, the harm that would be caused by the admission of Petitioner's degrading statement is precisely the type that rape shield laws are intended to prevent. The statement was designed to discredit the victim before the jury by suggesting that she not only had engaged in intercourse with Petitioner, but also with numerous other individuals, and she did so in unconventional positions while participating in lascivious and unacceptable relationships. That method, long-used by rape defendants to attempt to prejudice the jury against the victim by alluding to her moral character, or supposed lack thereof, is unacceptable except where constitutionally required. *E.g., Hodges v. States*, 524 N.E.2d 774, 781 (Ind. 1988). *See also Lucas*, 111 S. Ct. at 1746.

In any event, had Petitioner wished to pursue this sideline to his defense, he could have done so in a manner that did not violate Indiana's Rape Shield law. Petitioner could have offered any number of modified versions of the statement that would have captured its substance while avoiding humiliation to the victim. *See* Pet. App. 16a (Flaum, J., concurring); *United States v. Payne*, 944 F.2d 1458, 1469 (9th Cir. 1991) (requiring defendant to offer sanitized version of account, which excluded details of victim's past sexual conduct, does not violate constitution), *cert. denied*, 112 S. Ct. 1598 (1992). Petitioner, however, elected not to pursue any alternative methods of presenting this testimony.

Finally, it bears emphasis that the state courts did not apply Indiana's Rape Shield statute arbitrarily or mechanistically. *See Rock*, 483 U.S. at 52-57; *Chambers*, 410 U.S. at 302. Both the trial court and the Indiana Supreme Court engaged in an individualized analysis of the statement, Petitioner's overall defense and the purposes of the Rape Shield law in concluding that exclusion was proper. Pet. App. 93a-99a. The Constitution demands nothing more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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